

HOUSE BILL No. 1906

DIGEST OF INTRODUCED BILL

Citations Affected: IC 5-26.

Synopsis: Design-build public works projects. Authorizes a public agency to enter into a design-build contract for public works projects. Establishes the procedures for solicitation and award of a design-build contract.

Effective: July 1, 1999.

Kuzman, Frizzell

January 26, 1999, read first time and referred to Committee on Public Policy, Ethics and Veterans Affairs.

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Introduced

First Regular Session 111th General Assembly (1999)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 1998 General Assembly.

HOUSE BILL No. 1906

A BILL FOR AN ACT to amend the Indiana Code concerning state and local administration.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 5-26 IS ADDED TO THE INDIANA CODE AS A
2 **NEW ARTICLE TO READ AS FOLLOWS [EFFECTIVE JULY 1,**
3 **1999]:**

4 **ARTICLE 26. DESIGN-BUILD PUBLIC WORKS PROJECTS**
5 **Chapter 1. General Provisions**

6 **Sec. 1. Notwithstanding any other law, a public agency may**
7 **enter into a design-build contract for public projects if the public**
8 **agency makes a determination that it is in the best interests of the**
9 **public to enter into a design-build contract to complete the public**
10 **project.**

11 **Sec. 2. This chapter supplements laws relating to the awarding**
12 **of contracts for public projects.**

13 **Sec. 3. When a public agency determines that it is in the best**
14 **interests of the public to enter into a design-build contract to**
15 **complete a public project, the public agency shall follow the two (2)**
16 **phase procedure set forth in this article for awarding design-build**
17 **contracts.**

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1 Sec. 4. Notwithstanding IC 4-13.6-5-11, IC 5-16-2-2, and
2 IC 36-1-12-16, a design-build contract awarded as provided in this
3 chapter is valid and enforceable.

4 Chapter 2. Definitions

5 Sec. 1. The definitions in this chapter apply throughout this
6 article.

7 Sec. 2. "Affiliate" means any of the following:

- 8 (1) A parent.
- 9 (2) A descendant.
- 10 (3) A spouse.
- 11 (4) A spouse of a descendant.
- 12 (5) A sibling.
- 13 (6) A spouse of a sibling.
- 14 (7) An employer.
- 15 (8) An employee.
- 16 (9) A director.
- 17 (10) An officer.
- 18 (11) A partner.
- 19 (12) A limited liability company manager or member.
- 20 (13) A joint venturer.
- 21 (14) A corporation subject to common control with the design
22 criteria developer or member of the technical review
23 committee.
- 24 (15) A shareholder or corporation who controls the design
25 criteria developer or member of the technical review
26 committee.
- 27 (16) A corporation controlled by the design criteria developer
28 or member of the technical review committee.

29 Sec. 3. "Construction services" means services provided under
30 a design-build contract that are not design services.

31 Sec. 4. "Design-build contract" means a contract between a
32 public agency and a design-builder to furnish the following:

- 33 (1) The architectural, engineering, and related design services
34 as required for a given public project.
- 35 (2) The labor, materials, and other construction services for
36 the same public project.

37 Sec. 5. "Design-builder" means a person that furnishes the
38 necessary design and construction services under a design-build
39 contract, whether by itself or through subcontracts.

40 Sec. 6. "Design criteria developer" means an architect or
41 professional engineer registered under Indiana law who is
42 responsible for preparing the design criteria package for a specific



1 design-build project.

2 Sec. 7. "Design criteria package" means a set of documents that
3 provides sufficient information to permit a potential design-builder
4 to prepare a response to a public agency's request for proposals.

5 Sec. 8. "Design services" means those services that are:

- 6 (1) within the scope of practice specified by IC 25-4 for
7 architecture or IC 25-31 for professional engineering; or
8 (2) performed by a registered architect or professional
9 engineer in connection with the architect's or engineer's
10 professional employment or practice.

11 Sec. 9. "Person" means an individual, a firm, a partnership, a
12 limited liability company, a joint venture, an association, a
13 corporation, or another legal entity.

14 Sec. 10. "Proposal" means an offer by a potential design-builder
15 to enter into a design-build contract for a public project in
16 response to a request for proposals.

17 Sec. 11. "Phase two proposer" means a potential design-builder
18 that submits a proposal under IC 5-26-7.

19 Sec. 12. "Public agency" means any of the following that award
20 contracts for public projects under Indiana law:

- 21 (1) A state agency (as defined by IC 4-13-1-1).
22 (2) A state educational institution (as defined by
23 IC 20-12-0.5-1).
24 (3) A political subdivision (as defined by IC 36-1-2-13).

25 The term does not include the Indiana department of
26 transportation.

27 Sec. 13. (a) "Public project" means the process of designing,
28 constructing, reconstructing, altering, or renovating a public
29 building, an airport facility, or another structure or improvement
30 that is paid for out of a public fund or out of a special assessment.

31 (b) The term includes the following:

- 32 (1) A building or structure leased by a public agency under a
33 lease containing an option to purchase.
34 (2) A public improvement to real property owned by or leased
35 in the name of a public agency.

36 (c) The term does not include the process of designing,
37 constructing, altering, or repairing a highway, street, or alley.

38 Sec. 14. "Subcontractor" means a person who:

- 39 (1) is a party to a contract with a design-builder; and
40 (2) furnishes or performs construction services or design
41 services for the public project.

42 The term includes materialmen who supply contractors or

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1 subcontractors.

2 **Chapter 3. Rules and Procedures for Design-Build Contracts**

3 **Sec. 1. (a) The Indiana department of administration shall adopt**
 4 **rules under IC 4-22-2 for the solicitation and award of design-build**
 5 **contracts to be followed by state agencies.**

6 **(b) The following shall adopt written procedures for the**
 7 **solicitation and award of design-build contracts:**

8 **(1) A state educational institution.**

9 **(2) A political subdivision that lets contracts for public**
 10 **projects.**

11 **Sec. 2. Rules or procedures adopted under section 1 of this**
 12 **chapter must include at least the following:**

13 **(1) The procedure to select or designate a design criteria**
 14 **developer and prepare a design criteria package.**

15 **(2) The procedures for the preparation and contents of**
 16 **requests for qualifications.**

17 **(3) The procedures and standards to be used to qualify**
 18 **potential design-builders as provided in IC 5-26-6.**

19 **(4) The procedures for the preparation and contents of**
 20 **requests for proposals.**

21 **(5) The procedures for preparing and submitting proposals**
 22 **under IC 5-26-7.**

23 **(6) The criteria, procedures, and standards for the evaluation**
 24 **of proposals, based on price, and technical and design aspects**
 25 **of the public project, weighted for the project.**

26 **(7) The procedures for negotiations between the public agency**
 27 **and phase two proposers before acceptance of a proposal if**
 28 **any negotiations are contemplated. The procedures under this**
 29 **subdivision must contain safeguards to preserve confidential**
 30 **and proprietary information supplied by phase two proposers.**

31 **(8) The procedures for awarding and executing design-build**
 32 **contracts.**

33 **(9) The procedures for awarding design-build contracts in the**
 34 **event of public emergencies. The procedure must authorize**
 35 **the agency head to begin negotiations with the best qualified**
 36 **potential design-builder available at that time.**

37 **(10) The procedures for acting on formal protests relating to**
 38 **the solicitation or award of design-build contracts.**

39 **Chapter 4. Design-Builder Qualifications**

40 **Sec. 1. At the time design services or construction services are**
 41 **to be provided under a design-build contract, a design-builder**
 42 **must:**

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- (1) be a person;
- (2) employ persons; or
- (3) have as a partner, member, joint venturer, or subcontractor, persons;

licensed and registered to provide the design services and construction services required to complete the public project and do business in Indiana.

Sec. 2. A design-builder may contract with the public agency to provide design services or construction services that the design-builder is not itself licensed, registered, or otherwise qualified to perform if the design-builder provides the services through subcontracts with licensed, registered, or otherwise qualified persons in accordance with this article.

Sec. 3. This article does not limit or eliminate the responsibility or liability owed by a person providing design services on a design-build project to the public agency or other third parties imposed by Indiana law.

Chapter 5. Technical Review Committee

Sec. 1. (a) The public agency shall appoint a technical review committee comprised of at least three (3) individuals.

(b) The members of the technical review committee must include the following:

- (1) A representative of the public agency.
- (2) An architect registered under IC 25-4 or a professional engineer registered under IC 25-31.

(c) A member of the technical review committee who is an architect or a professional engineer may be either an employee of the public agency or an outside consultant retained by the public agency for the specific purpose of evaluating proposals submitted under this article.

(d) The design criteria developer may serve either as a full member of the committee or as a nonvoting adviser.

Sec. 2. (a) A member or an affiliate of a member of the technical review committee may not submit a proposal for or furnish any design services or construction services under the design-build contract.

(b) The design-builder may not delegate or subcontract professional services or construction services under the design-build contract to a member or an affiliate of a member of the technical review committee.

Sec. 3. The technical review committee shall do the following:

- (1) Qualify potential design-builders as provided in IC 5-26-6.



(2) Rate and score qualitative proposals as provided in IC 5-26-7.

Chapter 6. Phase One: Request for Qualifications

Sec. 1. (a) When design-build services are required for a public project, a public agency shall publish a notice of a request for qualifications under IC 5-3-1.

(b) A public agency may provide for supplemental notice as it determines is reasonably calculated to inform those performing design-build services of the request for qualifications.

(c) The time between the date of the first publication and date of receiving statements of qualifications may not be:

(1) less than two (2) weeks; or

(2) more than six (6) weeks.

Sec. 2. Each notice provided under section 1 of this chapter must include at least the following information:

(1) The location of the public project.

(2) A general description of the public project.

(3) The form of contract to be awarded.

(4) The anticipated date of award and desired project completion date.

(5) Budget limits for the design-build contract, if any.

(6) Affirmative action, disadvantaged business, or set-aside goals or requirements for the design-build contract, if any.

(7) The general criteria to be used in qualifying potential design-builders for participation under IC 5-26-7.

(8) The composition of the technical review committee.

(9) A description of the phase two requirements and subsequent management needed to bring the public project to completion.

(10) The place where any additional project descriptions or specifications are on file.

(11) The business hours of the public agency.

(12) The last date for accepting statements of qualifications from potential design-builders.

(13) The date when requests for proposals will be issued.

(14) Any other information required in the request for qualifications.

Sec. 3. A potential design-builder submitting proposals for the public project must submit a verified statement of qualifications setting forth the qualifications of the potential design-builder. The statement of qualifications must include the following:

(1) Evidence that establishes the potential design-builder has

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completed or demonstrated the capacity to complete projects of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the public project within time and budget constraints.

(2) A proposed project management plan that establishes that the potential design-builder has the experience, competence, and capacity needed to effectively complete the public project.

(3) Evidence that establishes that the potential design-builder has the capacity to obtain all required liability insurance and errors and omissions insurance.

(4) Evidence that the potential design-builder's stated bonding limit is at least one hundred fifty thousand dollars (\$150,000), as evidenced by a verified statement from a bonding company licensed to do business in Indiana and rated "A" or better by the A.M. Best Company, or a comparable rating by a comparable rating agency.

(5) Submission of evidence demonstrating the recent, current, and projected workload of the potential design-builder.

(6) Provision of information and a declaration providing details concerning any serious safety violations settled against the potential design-builder.

Sec. 4. (a) The technical review committee shall evaluate the following with respect to each potential design-builder:

- (1) Experience.
- (2) Safety record.
- (3) Management resources.
- (4) Employee training.
- (5) Technical competence.
- (6) Capability to perform.
- (7) Past performance.
- (8) Other appropriate facts submitted by the potential design builder in response to the request for qualifications.

(b) The technical review committee may not consider cost related or price related evaluation factors.

Sec. 5. The technical review committee shall do the following:

- (1) Select:
 - (A) at least three (3); and
 - (B) not more than five (5);
 potential design-builders considered to be the most highly qualified to perform the required services.



(2) Report the selection of qualified design-builders to the public agency.

Chapter 7. Phase Two: Requests for Proposals

Sec. 1. The public agency shall issue a request for proposals to the potential design-builders selected under IC 5-26-6-5. Each request for proposals must contain a design criteria package.

Sec. 2. (a) The design criteria developer shall prepare the design criteria package.

(b) The design criteria developer must be either:

(1) an employee of the public agency; or

(2) engaged by the public agency in compliance with Indiana law.

(c) The design criteria developer and an affiliate of the design criteria developer may not submit a proposal or furnish design or construction services under the design-build contract.

(d) The design-builder may not delegate or subcontract design or construction services under the design-build contract to the design criteria developer or an affiliate of the design criteria developer.

Sec. 3. (a) The public agency, in consultation with the design criteria developer, shall determine the scope and level of detail required for the design criteria package.

(b) The design criteria package must do the following:

(1) Furnish sufficient information to permit phase two proposers to prepare a response to a public agency's request for proposals.

(2) Specify the design criteria the public agency considers necessary to describe the public project and may include, as appropriate, the following:

(A) Legal description of the site.

(B) Survey information concerning the site.

(C) Interior space requirements.

(D) Special material requirements.

(E) Material quality standards.

(F) Conceptual design criteria for the project.

(G) Special equipment requirements.

(H) Cost or budget estimates.

(I) Quality assurance and quality control requirements.

(J) Site development requirements.

(K) Applicable codes and ordinances.

(L) Provisions for utilities.

(M) Parking requirements.



(N) Any other applicable requirements.

Sec. 4. In addition to the design criteria package, requests for proposals must contain at least the following:

(1) A description of the qualifications required of the phase two proposer and the selection criteria, including the weight of each criterion.

(2) Copies of the contract documents that the design-builder will be expected to sign.

(3) Any significant performance dates.

(4) A description of the drawings, specifications, or other submissions to be submitted with the proposal, with guidance as to the form and level of completeness of the drawings, specifications, or submissions that will be acceptable.

(5) Requirements for bid bonds, performance bonds, payment bonds, and insurance. A payment or performance bond is not required for, and may not provide coverage for, the part of a design-build contract awarded under this chapter that includes design services only.

(6) Other information relevant to the project that the public agency considers relevant, including any of the following:

(A) Surveys.

(B) Soil reports.

(C) Drawings or models of existing structures.

(D) Environmental studies.

(E) Photographs.

(F) References to public records.

Sec. 5. The request for proposals must include the requirement that a proposal be submitted in two (2) packages, a qualitative proposal and a price proposal.

Sec. 6. A proposal must satisfy the following:

(1) The qualitative proposal and the price proposal must each be submitted in a separately sealed, clearly identified package and must include the date and time of the submission.

(2) A proposal must be accompanied by a bid bond or certified check:

(A) in the amount equal to ten percent (10%) of the maximum cost of the design-build contract, as established by the proposal; and

(B) made payable to the public agency.

(3) A proposal must identify each person with whom the phase two proposer proposes to enter into subcontracts for primary design services and primary construction services under the

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design-build contract. For purposes of this subdivision, a person provides primary construction services if that person either by itself or through subcontracts furnishes or seeks to furnish more than fifty percent (50%) of the total construction services on a design-build project. For purposes of this subdivision, a person provides primary design services if that person either by itself or through subcontracts furnishes or seeks to furnish more than fifty percent (50%) of the total design services on a design-build project.

(4) The price proposal must:

(A) contain all design, construction engineering, inspection, and construction costs of the proposed project; and

(B) establish a maximum cost of the design-build contract that will not be exceeded if the proposal is accepted without change.

(5) The qualitative proposal must include data requested in the request for proposals.

Sec. 7. (a) The public agency shall submit the qualitative proposals to the technical review committee.

(b) The public agency may require clarifications from a proposer to ensure conformance of proposals with the design criteria.

(c) The technical review committee may not consider a proposal until the design criteria developer certifies that the proposal conforms with the design criteria.

Sec. 8. (a) The technical review committee shall review the qualitative proposals and establish a score for each qualitative proposal based on the factors, weighting, and process identified in the request for proposals.

(b) The technical review committee shall give a written composite score for each qualitative proposal and the reasons for the composite score.

Sec. 9. (a) The public agency shall notify all phase two proposers of the date, time, and location of the public opening of the sealed price proposals.

(b) Proposals may not be opened until expiration of the time established for making proposals as set forth in the request for proposals.

Sec. 10. The public agency shall do the following:

(1) Publicly open the sealed price proposals.

(2) Divide each phase two proposer's price by the score that the technical review committee has given to it to obtain an



adjusted score.

Sec. 11. (a) The public agency shall accept the proposal that provides the public agency with the best value but is not required to accept the lowest cost proposal.

(b) The public agency shall accept a proposal by written notice to the phase two proposer that submitted the accepted proposal.

(c) At the same time notice of acceptance is delivered, the public agency shall inform the other phase two proposers in writing that their proposals were not accepted.

Sec. 12. (a) The public agency may negotiate any contract term with the phase two proposer selected under section 11 of this chapter, except for those terms identified in the request for proposals as mandatory or not negotiable.

(b) If the public agency is unable to negotiate a contract with its first selection:

(1) negotiations with that phase two proposer may be terminated or suspended; and

(2) the public agency may negotiate with the next highest scored phase two proposer.

A public agency shall continue in accordance with this procedure until a contract agreement is reached or the selection process is terminated.

Sec. 13. (a) The public agency shall pay a stipend of twenty-five hundredths percent (0.25%) of the total design-build contract based upon the lowest price proposal to each phase two proposer that provides an unsuccessful proposal certified under this chapter for evaluation by the technical review committee. If a contract award is not made, the public agency shall pay all certified phase two proposers a stipend.

(b) A stipend required to be paid under this section shall be paid not later than ninety (90) days after the award of the contract or the decision not to award a contract.

Sec. 14. (a) In consideration for the stipend paid under section 13 of this chapter, the public agency reserves the right to use any concepts or information contained in the proposals in connection with any contract awarded for the public project, or in connection with a subsequent procurement, without any obligation to pay any additional compensation to the unsuccessful phase two proposers.

(b) An unsuccessful phase two proposer whose concepts or information are used without additional compensation on the public project or in connection with a subsequent procurement is not liable for civil damages as a result of alleged errors or



omissions arising in connection with the public project or subsequent improvement.

Sec. 15. A phase two proposer may decline a stipend under section 13 of this chapter. If a proposer declines the stipend, the public agency may not use any concepts or information contained in the proposal in connection with a contract awarded for the public project, or in connection with a subsequent procurement.

Sec. 16. (a) The public agency shall return a check submitted by an unsuccessful phase two proposer under section 6(2) of this chapter upon award of the contract.

(b) The public agency shall hold a check submitted by a successful proposer under section 6(2) of this chapter until delivery of the performance bond.

(c) If the proposal is accepted but the design-builder fails to execute the design-build contract, the check or bid bond is forfeited in an amount equal to the actual damages sustained by the public agency.

Sec. 17. The public agency may reject any or all proposals, except for the purpose of evading the provisions and policies of this article. The public agency may then solicit new proposals using the same or different performance criteria, budget constraints, or qualifications.

Sec. 18. (a) Unless and until a proposal is accepted, the drawings, specifications, and other information in the proposal is the property of the phase two proposer.

(b) The public agency:

(1) shall make reasonable efforts to maintain the confidentiality of all proposals and all information contained in the proposals; and

(2) may not disclose the proposals or the information contained in the proposals to the phase two proposer's competitors or to the public.

(c) After a proposal is accepted:

(1) disclosure of the proposal and the information in the proposal; and

(2) the ownership of the drawings, specifications, and information in the drawings and specifications;

shall be determined under Indiana law and the terms of the design-build contract.

Chapter 8. Elections of Successful Proposer

Sec. 1. (a) Except as provided in subsection (b), the public agency shall do the following not later than sixty (60) days after the

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1 date on which proposals are opened under IC 5-26-7:

2 (1) Award a contract.

3 (2) Provide the successful phase two proposer with written
4 notice to proceed.

5 (b) A public agency has the following time to comply with
6 subsection (a):

7 (1) Ninety (90) days if general obligation bonds are to be sold
8 to finance the construction that is the subject of the proposal.

9 (2) One hundred fifty (150) days if:

10 (A) revenue bonds are to be issued and approval by the
11 Indiana utility regulatory commission obtained; or

12 (B) special taxing district general obligation or revenue
13 bonds are to be issued and sold to finance the construction.

14 Sec. 2. A successful phase two proposer is entitled to do either
15 of the following if the public agency fails to comply with section 1
16 of this chapter:

17 (1) Reject the contract and withdraw the proposal without
18 prejudice.

19 (2) Grant an extension of time for:

20 (A) award and execution of the contract; and

21 (B) giving notice to proceed at an agreed later date.

22 Sec. 3. If the phase two proposer elects to reject the contract and
23 withdraw the proposal, notice of that election must be given to the
24 public agency in writing not later than fifteen (15) days after:

25 (1) the time required for the public agency to act under
26 section 1 of this chapter; or

27 (2) an extension granted under section 2(2) of this chapter.

28 Sec. 4. A phase two proposer who rejects a contract under this
29 section is entitled to receive a stipend under IC 5-26-7-13.

30 Chapter 9. Miscellaneous Provisions

31 Sec. 1. A design-build contract may be conditional upon
32 subsequent refinements in scope and price and may permit the
33 public agency to make changes in the scope of the project without
34 invalidating the design-build contract.

35 Sec. 2. (a) A person identified under IC 5-26-7-6(3) as a person
36 with whom the designed builder proposes to enter into
37 subcontracts for primary design services and primary construction
38 services under the design-build contract may not be replaced
39 without the approval of the public agency.

40 (b) A public agency may cancel the award of a design-build
41 contract if subsection (a) is violated.

42 Sec. 3. After award, the maximum cost established in the



1 **successful proposal may be adjusted by negotiated agreement**
2 **between the public agency and the design-builder to reflect**
3 **modifications in the proposed design-build project requested by the**
4 **public agency.**

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